

1 BARBARA L. JOHNSON (admitted in pro hac)  
2 barbarajohnson@paulhastings.com  
3 DONNA D. MELBY (admitted in pro hac)  
4 donnamelby@paulhastings.com  
5 PAUL, HASTINGS, JANOFSKY & WALKER LLP  
6 515 South Flower Street  
7 Twenty-Fifth Floor  
8 Los Angeles, CA 90071-2228  
9 Telephone: (213) 683-6000  
10 Facsimile: (213) 627-0705

6 JAY A. ZWEIG  
7 jay.zweig@bryancave.com  
8 BRYAN CAVE LLP  
9 One Renaissance Square  
10 Two North Central Ave., Suite 2200  
Phoenix, AZ 85004-4406  
Telephone: (602) 364-7300  
Facsimile: (602) 716-8300

11 Attorneys for Defendant  
12 SMITHKLINE BEECHAM CORPORATION

13 UNITED STATES DISTRICT COURT  
14  
15 DISTRICT OF ARIZONA

16 MICHAEL SHANE CHRISTOPHER,  
17 filing individually and on behalf of all  
18 others similarly situated; and FRANK  
19 BUCHANAN, filing individually and on  
behalf of all others similarly situated,

20 Plaintiffs,

21 vs.

22 SMITHKLINE BEECHAM  
23 CORPORATION, d/b/a  
GLAXOSMITHKLINE,

24 Defendant.

CASE NO. 08-CV-01498-FJM

**DEFENDANT'S RESPONSE IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR CONDITIONAL  
COLLECTIVE ACTION  
CERTIFICATION AND FOR  
HOFFMANN-LAROCHE NOTICE**

**ORAL ARGUMENT REQUESTED**

25  
26 I. INTRODUCTION

27 Michael Christopher and Frank Buchanan ("Plaintiffs") ask this Court to  
28 conditionally certify a nationwide collective action for a group of "GSK Pharmaceutical

1 Representatives” (hereinafter “PSRs”) (Pls.’ Mot. for Conditional Class Certification  
 2 (hereinafter “Pls.’ Mot.”) at ¶ 1). Plaintiffs’ nearly identical, boilerplate declarations—the  
 3 sole evidence submitted in support of the Motion—are insufficient evidence to prove that  
 4 such a group exists. Moreover, the Motion is insufficient as a matter of law. It rests on a  
 5 contrived, one-sided construction of the standard the Court must apply in ruling on a  
 6 conditional certification motion.

7       A.     **The Applicable Standard May Be “Lenient,” But Plaintiffs Still Must**  
 8                   **Provide Meaningful Evidence of Material Similarity.**

9       Plaintiffs recount at great length the “lenient” standard they claim the Court must  
 10 apply in determining whether conditional collective action status is warranted. The  
 11 applicable standard is relaxed, to be sure, but it is a standard nonetheless. *See, e.g.,*  
 12 *Simmons v. T-Mobile USA, Inc.*, No. CIV.A.H 06-1820, 2007 WL 210008, at \*7-8 (S.D.  
 13 Tex. Jan. 24, 2007) (despite producing approximately two dozen declarations, plaintiff  
 14 was unable to meet his burden “even under a lenient standard”). Before any certification  
 15 and notice, Plaintiffs’ evidence must provide a reason for the Court to believe that the  
 16 purported collective action group is sufficiently homogeneous in material respects (here,  
 17 the factors relevant to the FLSA’s exemptions) to permit testimony from a few witnesses  
 18 to serve as the testimony of all.

19       B.     **Plaintiffs’ Boilerplate, Conclusory Declarations Do Not Suffice.**

20       Even measured against the “lenient” standard in which Plaintiffs place so much  
 21 faith, their evidentiary showing is insufficient. Plaintiffs have submitted nothing but their  
 22 own declarations as evidence that all of Defendant’s PSRs purportedly are similarly  
 23 situated. Each of Plaintiffs’ declarations states—in identically worded, conclusory  
 24 language—that PSRs “all have the same basic duties.” Pls.’ Decls. at ¶ 12. Plaintiffs  
 25 purport to represent over 6,000 PSRs, yet they identify only 6 PSR job titles, Pls.’ Mot. at  
 26 3, when there are between 50 and 100 job titles, depending on the point in time, for PSRs.  
 27 The boilerplate, unsubstantiated statements in Plaintiffs’ declarations cannot alone  
 28 support conditional certification of a collective action. *See Trinh v. JP Morgan Chase &*

1       Co., No. 07-CV-1666 W (WMC), 2008 WL 1860161, at \*4 (S.D. Cal. Apr. 22, 2008)  
 2       (denying conditional certification of an FLSA collective action because plaintiffs  
 3       “provide[d] no real evidence, beyond their own speculative beliefs,” contained in  
 4       plaintiffs’ affidavits, that they were similarly situated to the putative class).

5           C.     **Notice, When Appropriate, Facilitates Case Administration, But That Is**  
 6           **Not the Case Here.**

7       Notice now, when the record Plaintiffs present is so incomplete and so little is  
 8       known about the shape the case will take, will certainly not further, and may well  
 9       undermine, case management interests.

10      Conditional collective action certification should be denied.

11     II.    **STATEMENT OF FACTS**

12     A.     **GSK’s Organizational Structure.**

13       SmithKline Beecham Corporation d/b/a GlaxoSmithKline (“GSK”) is the U.S.  
 14       operating company of the world’s second largest pharmaceutical company, the GSK  
 15       Group. *See Sons Decl.*, attached hereto as Exhibit A, at ¶ 4. The GSK Group was shaped  
 16       by a series of acquisitions and mergers, in this country and abroad, including, most  
 17       recently, the 2000-01 merger of Glaxo Wellcome and SmithKline Beecham. *Id.* The  
 18       Group employs over 100,000 employees worldwide and approximately 25,000 employees  
 19       in the United States. *Id.* GSK sells over seventy different prescription drug products that  
 20       treat major disease areas, including asthma and other respiratory conditions, HIV/AIDS,  
 21       mental health, migraines, diabetes, heart failure, digestive conditions and cancer. *Id.* at ¶  
 22       5. GSK is also an industry leader in the area of vaccines. *Id.* Currently, there are over  
 23       6,000 sales representative employees in U.S. Pharma for GSK. *Id.* at ¶ 13.

24       At GSK, there is no single, homogeneous “sales organization.” Sons Decl. at ¶ 6.  
 25       All sales representatives do not report up to a single senior sales executive; they report up  
 26       a chain of command to the leaders of the various “business units” or divisions. *Id.* Those  
 27       business units are organized to reflect the very different products and sales models each  
 28       unit handles: Pharmaceuticals (“General Pharma”), Payor Markets, Oncology, Vaccines,

1 and HIV and Immunology.<sup>1</sup> *Id.* at ¶ 7. Several of these business units, including General  
 2 Pharma and Oncology, are further divided into smaller sales groups based on the types of  
 3 pharmaceuticals sold and the accounts for whom PSRs will be responsible. *Id.* There are  
 4 many different job titles for PSRs within GSK's various business units. *Id.* at ¶ 12. Over  
 5 time, GSK has had between 50 and 100 job titles for PSR positions. *Id.*

6       B.     The Sales Representative Positions.

7           Because the target markets, distribution models, and underlying science of GSK's  
 8 prescription drugs vary dramatically, the methodologies GSK uses to sell these drugs vary  
 9 as well. Sons Decl. at ¶ 8. And because the methodologies vary, so too do the day-to-day  
 10 job duties of the responsible sales professionals assigned to each business unit. *Id.* at ¶¶  
 11 8-9. Plaintiffs do not — and could not — assert that a PSR in the Medical Center Sales  
 12 group in General Pharma, for example, could "fill-in" for a PSR who is an Immunization  
 13 Specialist in the Vaccines division. *See id.* at ¶ 9, Exs. A, B. The training, the science,  
 14 the sales methods, and the types of customers — and, indeed, the type of PSR — all vary  
 15 according to the applicable business unit in ways that belie Plaintiffs' attempted portrayal  
 16 of GSK PSRs' jobs as "fungible." *See generally id.* at ¶ 9, Exs. A-F.

17       III.    **PLAINTIFFS HAVE FAILED TO SUPPORT THEIR MOTION WITH  
 18 ANY PROBATIVE, ADMISSIBLE EVIDENCE**

19       A.     The Collective Action Procedure Works Only When There Is Material  
 20 Homogeneity.

21           The collective action procedure is intended to facilitate the "efficient  
 22 resolution...of [material] common issues of law and fact." *Hoffmann-LaRoche v.*  
 23 *Sperling*, 493 U.S. 165, 170 (1989). A collective action should be sustained only when  
 24 the employees in the putative collective class are "similarly situated" to one another. 29  
 25 U.S.C. § 216(b) (2006). In such a case, representative proof from a comparatively small

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26       <sup>1</sup> Prior to January 1, 2009, the sales organization consisted of the following business units:  
 27 Vaccines, HIV, Neurohealth, Critical and Supportive Care (formerly Acute Care),  
 28 Oncology, Managed Markets, and the two General Pharmaceutical (or "Pharma") teams  
 (Research Triangle Park (or RTP) Pharma and Philadelphia (or Philly) Pharma). Sons  
 Decl. at ¶ 7.

1 number of witnesses can facilitate efficient resolution of a case where, for example, those  
 2 witnesses can testify about the job duties of a larger group of employees allegedly  
 3 misclassified by their employer.

4       If the day-to-day work tasks of those in the putative class are materially different in  
 5 ways relevant to the exemption question, however, the “collective action” process is  
 6 unsustainable. When any material level of heterogeneity exists, “[t]o determine which  
 7 employees are entitled to overtime compensation … [the fact-finder must undertake] an  
 8 individual, fact-specific analysis of each employee’s job responsibilities under the  
 9 relevant statutory exemption criteria.” *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F.  
 10 Supp. 2d 493, 498 (D.N.J. 2000).

11       Thus, the “similarly situated” question “must be analyzed in terms of the nature of  
 12 the job duties performed by each class member, as the ultimate issue to be determined is  
 13 whether each employee was properly classified as exempt.” *Id.* That is why the authority  
 14 to issue notice should be exercised only in “appropriate cases.” *Hoffmann-La Roche*, 493  
 15 U.S. at 169.

16       B.     **Even at the Pre-Discovery Stage, Plaintiffs Must Make an Evidentiary**  
 17           **Showing of Homogeneity.**

18       Courts apply a two-tiered approach to determine whether plaintiffs are similarly  
 19 situated to each other and to other individuals for the purpose of certifying a § 216(b)  
 20 collective action. *Trinh*, 2008 WL 1860161, at \*3. In the first or “notice” stage, the Court  
 21 makes this determination based on the pleadings and any affidavits that have been  
 22 submitted by the parties. *Id.* Plaintiffs have the burden of making “substantial allegations  
 23 that the putative class members were together the victims” of an illegal plan by their  
 24 employer to deprive them of wages. *Id.* (emphasis added). “Substantial allegations” are  
 25 “detailed allegations supported by affidavits which successfully engage a defendant’s  
 26 affidavits to the contrary.” *Id.* (citing *Hipp v. Nat’l Liberty Life Ins. Co.*, 252 F.3d 1208,  
 27 1219 (11th Cir. 2001)).

28       Plaintiffs must provide *details* of the extent to which all putative class members are

1 similar. Simple, conclusory statements like those made by Plaintiffs here that plaintiffs  
 2 and the putative class had “essentially the same job description and training and were  
 3 compensated in the same manner” are not enough. *Trinh*, 2008 WL 1860161, at \*3; *see also*  
 4 *Schwed v. Gen. Elec. Co.*, 159 F.R.D. 373, 375-76 (N.D.N.Y. 1995) (plaintiff must  
 5 “provide some factual basis from which the court can determine if similarly situated  
 6 potential plaintiffs exist.”). “[R]eal evidence, beyond [Plaintiffs’] own speculative  
 7 beliefs” is required for conditional certification of a collective action. *Trinh*, 2008 WL  
 8 1860161, at \*4.

9           1.       **Plaintiffs Have Been Unable to Show the Existence of Others**  
 10                   **Who Desire to Opt-In.**

11                  The two Plaintiffs have not identified a single individual other than themselves who  
 12 desires to opt in to their putative collective action. “[B]efore facilitating notice [at the  
 13 conditional certification stage], a district court should satisfy itself that there are other  
 14 employees who desire to ‘opt in.’” *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233,  
 15 1259-60 (11th Cir. 2008) (citing *Dybach v. State of Florida Department of Corrections*,  
 16 942 F.2d 1562, 1567 (11th Cir. 1991) (internal quotation omitted)).

17                  Discovery has only just begun, but that does not prevent Plaintiffs from offering  
 18 facts in support of their motion or from demonstrating the existence of other PSRs who  
 19 are willing to opt in. Plaintiffs each worked for Defendant for approximately four years,  
 20 *see* Compl. at ¶¶ 8, 10, during which time Plaintiffs by their own admission met and  
 21 conversed with other PSRs “both in [their] own work areas and at national and regional  
 22 GSK meetings, conventions, and training sessions.” Pls.’ Decl. at ¶ 4. In fact, Buchanan  
 23 was a GSK trainer, who trained other PSRs. Buchanan Decl. at ¶¶ 4, 22-23. The fact that  
 24 Plaintiffs have not yet found a single PSR willing to opt in to this litigation speaks  
 25 volumes.

26           2.       **Plaintiffs’ Evidence Does Not Support a Finding that Members**  
 27                   **of the Putative Class Are Similarly Situated.**

28                  Plaintiffs’ evidentiary proffer on “similarity” is inadequate. They seek certification

1 of a collective class of all GSK's PSRs, regardless of their title, their geographic location,  
 2 the products they sell or to whom, and the particular business unit for which they work.<sup>2</sup>  
 3 Plaintiffs have submitted virtually no evidence at all, much less evidence adequate to  
 4 demonstrate that despite these differences, PSRs are so fungible that testimony from one  
 5 would effectively be testimony from all. Instead, Plaintiffs hide behind the supposedly  
 6 "lenient" or "relaxed" standard often applied at the "notice" stage of an FLSA collective  
 7 action. As many cases make plain, however, even this "modest" standard requires  
 8 consequential proof,<sup>3</sup> and Plaintiffs' paltry evidentiary showing—their own subjective  
 9 beliefs and conclusory assertions—does not support notice to any group of GSK  
 10 employees, much less the all-encompassing group they propose.

11           **3.       Plaintiffs' Declarations Lack Probative Value.**

12       Plaintiffs have submitted nothing but their own declarations — which are identical  
 13 in nearly every respect save the names, dates and loci of employment, and job title(s)—to  
 14 support their allegations of similarity between themselves and the members of the  
 15 proposed collective action. These declarations purport to show that all of GSK's PSRs do  
 16 the same work on a day-to-day basis.<sup>4</sup> In fact, Plaintiffs' self-serving declarations provide  
 17 no evidence to support that claim.

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18       <sup>2</sup> Plaintiffs seek certification of a collective class of all PSRs, nationwide. *See* Pls.' Notice  
 19 of Correction Pertaining to Pls.' Mot. for Collective Action Certification and for  
*Hoffmann-LaRoche* Notice [Docket # 32].

20       <sup>3</sup> A list of cases denying pre-discovery notice for failure to satisfy even the "lenient"  
 21 standard would stretch for pages, but the following is a representative sample drawn  
 22 solely from 2007-2008. *See, e.g., Silverman v. SmithKline Beecham Corp.*, October 15,  
 2007 Order Denying Without Prejudice Plaintiff's Motion for Conditional Collective  
 23 Action Certification and Notice, attached hereto as Exhibit B (plaintiff's nine nearly  
 24 identical declarations, which failed to address the similarities or differences between the  
 25 GSK business units in which the declarants worked, were insufficient evidence to show  
 26 the group was "similarly situated"); *Aguirre v. SBC Commc'nns, Inc.*, No. CIV.A.H 05-  
 27 3198, 2007 WL 772756, at \*14-15 (S.D. Tex. Mar. 12, 2007) (plaintiffs submitted no  
 28 evidence to support their allegations of being similarly situated; defendant's evidence, on  
 the other hand, showed considerable variation in job duties performed by the putative  
 class); *Simmons v. T-Mobile USA, Inc.*, No. CIV.A.H 06-1820, 2007 WL 210008, at \*7-8  
 (S.D. Tex. Jan. 24, 2007) (holding that, despite producing approximately two dozen  
 declarations, plaintiff was unable to meet his burden of showing a common policy or plan  
 "even under a lenient standard").

29       <sup>4</sup> Defendant objects to the portions of Plaintiffs' declarations purporting to show that all of  
 30 GSK's PSRs are similarly situated because the declarations lack foundation, lack personal  
 31 knowledge, and are based on hearsay.

1           First, Plaintiffs' declarations do not contain first-hand knowledge of facts adequate  
 2 to show similarity. Plaintiffs have worked in only two of GSK's numerous sales business  
 3 units, and in only two of the fifty states. *See* Pls.' Decl. at ¶ 7. The declarations fail to  
 4 name, much less describe, the numerous business units in which Plaintiffs did not work.  
 5 Plaintiffs do not contend that they observed or even discussed the job duties in, for  
 6 example, the Oncology business unit, with anyone in a position to know what those PSRs  
 7 do each day. Plaintiffs lack factual foundation for opining that all PSR jobs are materially  
 8 the same.

9           Instead, the declarations are based solely on Plaintiffs' own limited "personal  
 10 observations and experiences." Pls.' Decl. at ¶ 4. Plaintiffs allege that they attended  
 11 meetings, conventions, training sessions, and presentations with unnamed other PSRs, *id.*,  
 12 but they do not assert that the unnamed "other" PSRs with whom they conversed about  
 13 their job duties came from other geographic locations or from each of the various other  
 14 business units. Plaintiffs do not identify any facts establishing that their conversations  
 15 with other PSRs provided them the detailed knowledge necessary to support a credible  
 16 claim of similarity. *See id.* Plaintiffs want to include in their collective action, for  
 17 example, Oncology PSRs in Oregon, Payor Markets PSRs in Massachusetts, and Vaccines  
 18 PSRs in North Carolina, but there is simply no evidentiary basis for concluding that these  
 19 PSRs are similarly situated to Plaintiffs, or even that Plaintiffs have any factual foundation  
 20 for contending that this might be true. This is simply not sufficient. *See, e.g., Trinh*, 2008  
 21 WL 1860161, at \*4 (finding that plaintiffs' declarations, which were the only "evidence"  
 22 submitted to support their motion for conditional certification of a collective action, were  
 23 insufficient to provide even the modest factual showing required at the notice stage; the  
 24 declarations "provide no real evidence, beyond [plaintiffs'] own speculative beliefs.");  
 25 *Benson v. West Coast Const.*, No. C06-1630RSM, 2007 WL 445456, at \*2 (W.D. Wash.  
 26 Feb. 6, 2007) (plaintiff's single, self-serving declaration, submitted without any evidence  
 27 to support the statements contained therein, was insufficient to show that plaintiff was  
 28 similarly situated to the putative class, "even under [the] lenient [notice stage] standard.").

1           C. **Plaintiffs Have Offered No Factual Basis for Inferring that the Putative**  
 2           **Class Members Were Victims of a Uniform Policy, Plan, or Practice.**

3           To determine whether a collective action is appropriate, the Court must determine  
 4 whether there is any factual basis to suggest that the purported members of the collective  
 5 action were victims of a common policy, plan, or practice. *Wynn v. NBC*, 234 F. Supp. 2d  
 6 1067, 1081 (C.D. Cal. 2002). A “plaintiff must make some rudimentary showing of  
 7 commonality between the basis for his claims and that of the potential claims of the  
 8 proposed class, beyond the mere facts of job duties and pay provisions.” *Barron v. Henry*  
 9 *County Sch. Sys.*, 242 F. Supp. 2d 1096, 1103-04 (M.D. Ala. 2003).

10          The Central District of California recently denied conditional certification and  
 11 notice in a case nearly identical to this one, *Silverman v. SmithKline Beecham Corp.*, Case  
 12 No. CV-06-7272 DSF. In an Order dated October 15, 2007, attached hereto as Exhibit B,  
 13 the *Silverman* court found that David Silverman, a GSK PSR who sought conditional  
 14 certification of a nationwide collective class of PSRs whom he alleged had been  
 15 misclassified as exempt under the FLSA, had not submitted evidence showing that he and  
 16 the putative class were “similarly situated.” Ex. B at 3. Silverman submitted nine nearly  
 17 identical declarations from current and former PSRs; however, none of the declarations  
 18 addressed the differences between the GSK business unit(s) in which the declarants  
 19 worked. *Id.* at 2-3. The court found that the declarations presented only a “narrow,  
 20 potentially unrepresentative sample in support of a broad conclusion,” and denied  
 21 conditional certification and notice because Silverman failed to provide “at least some  
 22 evidence” of similar employment practices across all GSK business units. *Id.* at 3.

23          Plaintiffs offer no more evidence of commonality with respect to GSK’s alleged  
 24 policy, plan, or practice of depriving them of overtime compensation than Silverman did.  
 25 Even with respect to the basic question of whether PSRs uniformly work more than 40  
 26 hours per week, Plaintiffs’ evidentiary showing is deficient. Plaintiffs’ declarations state  
 27 generally that PSRs “routinely work in excess of forty hours in a workweek,” and that  
 28 Plaintiffs in fact worked such a schedule. Christopher Decl. at ¶¶ 53-4; Buchanan Decl. at

¶¶ 56-7. There is no other evidence provided, however, suggesting that such a work practice applied broadly to all sales representatives, across all geographical or functional units. Plaintiffs' vague and conclusory evidence cannot demonstrate that other sales representatives throughout the country, across all business units, worked in excess of forty hours per week, much less that any person who did so was required to work beyond forty hours per week pursuant to anything more than an individualized directive from his own local supervisor. As such, Plaintiffs have failed to make even a "rudimentary showing of commonality." *Barron*, 242 F. Supp. 2d at 1103-04.

#### **IV. THE PROBATIVE EVIDENCE DEMONSTRATES THAT PUTATIVE COLLECTIVE CLASS MEMBERS ARE NOT SIMILARLY SITUATED**

Plaintiffs have failed to carry their burden to provide a sufficient evidentiary basis demonstrating that the group they seek to represent is sufficiently homogenous to warrant conditional certification and notice. That should end the Court's inquiry.

Plaintiffs' meager declarations, however, are not the only evidence before the Court. The declarations submitted by Defendant with this brief establish that myriad differences among the putative collective class members preclude any finding that they are "similarly situated."

##### **A. The Duties Performed by Plaintiffs and the Putative Collective Class Members That Are Determinative of the FLSA's Exemptions Are Not Materially the Same.**

As noted above, although employees' jobs need not be identical for them to be deemed "similarly situated," the proposed collective class must be sufficiently homogeneous to allow a comparatively small number of individuals to "tell the story" of all those who will not actually testify on their own behalf. If representative proof cannot be used, the collective action process provides no efficiencies and the "similarly situated" standard is not met. Although this motion does not require the Court to decide whether any or all of GSK's PSRs are exempt from the FLSA's overtime provisions, it does

1 require the Court to identify the factors upon which the FLSA exemption question will  
 2 ultimately turn, because those are precisely the factors as to which employees must be  
 3 “similarly situated” in order for a collective action to be appropriate. *See generally*  
 4 *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 477 (S.D.N.Y. 2008)  
 5 (denying notice to a putative collective class of PSRs because the PSRs likely qualified  
 6 for the administrative exemption).

7 Plaintiffs assert that all PSRs, including themselves, are similarly situated because  
 8 they share the same primary job duty, are subject to similar policies and procedures, and  
 9 do not receive overtime pay. Pls.’ Mot. at 4-9. These facts alone, even if they were true  
 10 (they are not), are insufficient to warrant conditional class certification. *See Evancho v.*  
 11 *Sanofi-Aventis U.S. Inc.*, No. 07-2266 (MLC), 2007 WL 4546100, at \*3 (D.N.J. Dec. 19,  
 12 2007) (“Employees’ status under the FLSA may vary, even if they have the same job title,  
 13 if their job responsibilities and duties differ among each other...[S]uch differences are  
 14 relevant to the statutory criteria of the FLSA exemptions.”).<sup>5</sup> There may be significant  
 15 differences in job responsibilities among a group of employees who share the same job  
 16 title, much less among a group of employees who have different specific job titles, all  
 17 generically referred to by Plaintiffs as “pharmaceutical representatives,” and those  
 18 differences may require an individualized determination as to FLSA exemption status.  
 19 *See, e.g., id.* \*3 (denying conditional certification of a class of PSRs because differences  
 20 between the PSRs’ job responsibilities and duties showed that their exemption status  
 21 under the FLSA may vary among plaintiffs and potential collective action members).  
 22 Thus, the question is whether Plaintiffs have made an evidentiary showing (rather than  
 23 generalized accusations) that the GSK PSRs’ day-to-day tasks are materially the same

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24 <sup>5</sup> *See also Threatt v. CRF First Choice, Inc.*, No. 1:05CV117, 2006 WL 2054372, at \*13  
 25 (N.D. Ind. July 21, 2006) (“[A]ctual facts govern the relevant analysis, not mere policies  
 26 and procedures. ‘Whether similarly situated employees exist depends on the employees’  
 27 actual qualifications and day-to-day duties, rather than their job descriptions.’”) (citations  
 28 omitted); *King v. West Corp.*, No. 8:04CV318, 2006 WL 118577, at \*14 (D. Neb. Jan. 13,  
 2006) (“The members of the proposed opt-in class have the same job title, and essentially  
 the same job description[] [but] employees with the same job title are not ‘similarly  
 situated’ for the purposes of an ‘opt-in’ FLSA class if their day-to-day job duties vary  
 substantially.”).

<sup>1</sup> with respect to the factors pertinent to their exempt status. 29 U.S.C. § 213(a)(1) (2006).<sup>6</sup>

1. **Application of the Outside Sales Exemption Turns on an Array of Factually Complex Factors.**

Under the FLSA, an exempt outside salesperson is an individual “[w]hose primary duty is[] making sales...or obtaining orders or contracts for services...and [w]ho is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.” 29 C.F.R. § 541.500(a) (2008). The factors to be considered include whether: (1) “the job was advertised as a sales position and the employee was recruited based on sales experience and abilities;” (2) the salesperson received “[s]pecialized sales training;” (3) the salesperson’s “[c]ompensation [was] based wholly or in significant part on commissions;” (4) the salesperson was required to independently solicit new business; and (5) the salesperson “receiv[ed] little or no direct or constant supervision in carrying out daily work tasks.” *Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1262 (C.D. Cal. 2007) (quoting *Nielsen v. DeVry, Inc.*, 302 F. Supp. 2d 747, 756-58 (W.D. Mich. 2003)). “[N]one of the [relevant factors] can be considered in isolation.” *Nielsen v. Devry, Inc.*, 302 F. Supp. 2d 747, 756 (W.D. Mich. 2003). Rather, courts “must consider the totality of the circumstances in a task-related context.” *Id.*

## **2. The Administrative Exemption Inquiry Also Turns on Complex Factual Determinations.**

To qualify for the administrative exemption an employee must (1) earn no less than \$455 per week, and must perform as his primary duty (2) “office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers” that (3) “includes the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. § 541.200(a) (2008). The regulations identify a non-exclusive list of job types that meet this requirement, including advertising, marketing, and public relations; in addition to typical administrative roles

<sup>6</sup> GSK does not intend to limit its defenses by focusing on the two exemptions described in this Opposition. Other exemptions may also apply.

such as finance and human resources. 29 C.F.R. § 541.201(b) (2008). The regulations also provide a long non-exhaustive list of factors to consider in determining whether the work involves discretion and independent judgment. 29 C.F.R. § 541.202(b) (2008). Again, the exemption determination must be made in “light of all the facts involved in the particular employment situation in which the question arises.” *Id.*

**B. Material Differences Exist Among the PSRs on Factors Directly Related to the Exemption Questions.**

As noted above, Plaintiffs’ declarations are entirely silent on almost all of the critically important factors on which the outside sales and administrative exemption determinations will ultimately turn. They say nothing, for example, about whether Plaintiffs’ or the putative class members’ jobs were advertised or denominated as sales jobs, whether the incumbents in each of the different PSR jobs receive specialized sales training, or whether the various categories of PSRs in the putative collective class were expected to solicit new business. They say nothing about whether Plaintiffs’ or the putative class members’ work as PSRs was directly related to GSK’s management or general business operations or whether PSRs in all GSK business units exercise discretion and independent judgment with respect to matters of significance.

Defendant’s declarations, by contrast, speak directly to the many factors relevant to determining the applicability of both the outside sales and administrative exemptions. Plaintiffs contend that PSRs market GSK’s products by urging healthcare professionals to write prescriptions for GSK’s pharmaceuticals. Pls.’ Mot. at 4. Defendant’s declarations demonstrate that PSRs have different types of customers and make different types of sales depending upon the business unit for which they work. A PSR in the Payor Markets division sells GSK’s products by encouraging health care, managed care, and insurance plans to put GSK products on their formulary (i.e. approved drug list). McGowan Decl., attached hereto as Exhibit C, at ¶ 7. A PSR in the Vaccines division sells GSK’s products by encouraging physicians, hospitals, prisons, county facilities, pharmacy buyers and others to place orders to directly purchase GSK’s vaccine products. Wells Decl., attached

1 hereto as Exhibit D, at ¶¶ 6, 8-9. Even within the business units, PSRs in different  
 2 subgroups cater to unique customers and make different types of sales. Within General  
 3 Pharma, for example, a PSR in the Respiratory group sells GSK's products by  
 4 encouraging physicians to write prescriptions with which patients may purchase GSK's  
 5 products. Kemp Decl., attached hereto as Exhibit E, at ¶ 7. A PSR in the Senior Care  
 6 Sales subgroup of the Medical Center Sales group within General Pharma sells GSK's  
 7 products both by encouraging physicians working for nursing homes to write prescriptions  
 8 for GSK pharmaceuticals and also by convincing long term care pharmacies and  
 9 consultant pharmacists to stock GSK products. Burk Decl., attached hereto as Exhibit F,  
 10 at ¶¶ 8-9.

11 Plaintiffs allege that all PSRs receive standardized training. Pls.' Mot. at 4, 6;  
 12 Christopher Decl. at ¶ 38; Buchanan Decl. at ¶ 42. While PSRs may undergo an initial  
 13 round of standardized training when they begin working for GSK, the subsequent training  
 14 they receive varies according to the business unit for which they work and the GSK  
 15 products they sell. *See, e.g.*, Burk Decl. at ¶ 10; Kamerman Decl., attached hereto as  
 16 Exhibit G, at ¶ 11.

17 PSRs receive incentive compensation, but that, too, varies depending on the  
 18 business unit, each of which establishes its own incentive compensation program.  
 19 Pellegrino Decl., attached hereto as Exhibit H, at ¶¶ 7-13, 20-23. For example, at this  
 20 time PSRs in the Payor Markets business unit receive incentive compensation based on  
 21 their success in meeting subjective Management by Objectives (MBOs), McGowan Decl.  
 22 at ¶ 10, whereas PSRs in the Oncology business unit receive incentive compensation  
 23 based on an objective measurement of provider prescription frequency. Clark Decl.,  
 24 attached hereto as Exhibit I, at ¶ 12. Even within business units, PSRs who work for  
 25 different subgroups may receive incentive compensation on differing bases. For example,  
 26 at this time, PSRs in the Medical Center Sales group within General Pharma receive  
 27 incentive compensation based on revenue growth for the products they sell, Kamerman  
 28 Decl. at ¶ 12, PSRs in the Respiratory group within General Pharma receive incentive

1 compensation that based on either market share or sales volume increases, depending on  
 2 the drugs sold, Lopato Decl., attached hereto as Exhibit J, at ¶ 11, and PSRs in the  
 3 Cardiovascular group within General Pharma receive incentive compensation based on the  
 4 number of prescriptions written for the products they sell. Atalla Decl., attached hereto as  
 5 Exhibit K, at ¶ 9.

6 Plaintiffs allege that PSRs are required to “follow GSK approved scripts” when  
 7 interacting with providers, Pls.’ Decs. ¶ 19; however, Defendant’s declarants refute these  
 8 allegations. *See, e.g.*, Abreu Decl., attached hereto as Exhibit L, at ¶¶ 8; Clark Decl. at ¶  
 9 10; Lopato Decl. at ¶ 9; Wells Decl. at ¶ 13; Burk Decl. at ¶ 11; Atalla Decl. at ¶ 10. In  
 10 fact, the opposite is true. PSRs all exercise discretion and independent judgment, to  
 11 varying degrees depending on the business unit for which they work and their level of  
 12 seniority. For example, a Senior Executive Therapeutic Specialist in the Cardiovascular  
 13 group of General Pharma identifies medical providers who are decision-makers regarding  
 14 the purchase of pharmaceuticals for hospital formularies and develops an in-depth  
 15 knowledge and understanding of the products for which he is responsible so that he can  
 16 tailor his sales methodologies to each provider’s needs. Acosta Decl., attached hereto as  
 17 Exhibit M, at ¶ 14. A Regional Account Manager in the Payor Markets division must  
 18 develop strategies for selling GSK products to insurance plans, who will include the  
 19 products on their formularies, but also must negotiate contracts and rebates on the GSK  
 20 products that will be included on those formularies. McGowan Decl. at ¶¶ 8-9. A Senior  
 21 Executive Clinical Specialist in the HIV and Immunology division does not provide  
 22 product samples (contrary to Plaintiffs’ allegations that *all* PSRs provide samples, Pls.  
 23 Decl. ¶ 10.) and, therefore, is expected to discuss detailed clinical information and  
 24 developments in the HIV area. Abreu Decl. ¶ 13.

25 These differences, and many others, will have a material impact on the day-to-day  
 26 activities of each GSK sales representative. The typical activities of a sales representative  
 27 vary greatly both within and across business units.

28 Even if the Court were to accept *all* of the declarations before the Court as true —

1 Plaintiffs' and Defendant's —the big picture they collectively portray is one in which the  
 2 members of the putative class vary significantly in the characteristics that will be directly  
 3 relevant to the Court's determinations in this matter. These differences are meaningful,  
 4 and indeed, the Court's analysis may ultimately turn on these very factors. On the  
 5 undisputed record before the Court, Plaintiffs cannot be considered "similarly situated" to  
 6 the putative collective class of many thousands of current and former GSK sales  
 7 representatives.

8 **V. THE FORM OF NOTICE SUGGESTED BY PLAINTIFFS IS  
 9 DEFECTIVE AND DECEPTIVE; THE PARTIES SHOULD BE  
 10 REQUIRED TO MEET AND CONFER SHOULD A FORM NOTICE  
 11 BE NEEDED**

12 As explained above, no notice is warranted on this record. In any event, however,  
 13 the Court should not approve the form of notice Plaintiffs have suggested. Any notice the  
 14 Court might ultimately require will need to account for the scope of any collective class  
 15 the Court may certify. Moreover, the notice Plaintiffs propose is one-sided and contains  
 16 numerous erroneous and/or objectionable provisions. For example, Plaintiffs propose a  
 17 90-day deadline for opt-ins to file consent forms. Pls.' Mot. at 14. The vast majority of  
 18 reported decisions afford opt-ins 30 days or less from the date of the court order  
 19 approving notice or from the date on which the notices are mailed. *See, e.g., King v. ITT*  
*20 Cont'l Baking Co.*, No. 84 c 3410, 1986 WL 2628, at \*6 (N.D. Ill. Feb 18, 1986) (30  
 21 days); *Watkins v. Milliken & Co.*, 613 F. Supp. 408, 421 (W.D.N.C. 1984) (30 days); *Held*  
*22 v. Nat'l R. R. Passenger Corp.*, 101 F.R.D. 420, 423 (D.D.C. 1984) (30 days); *Johnson v.*  
*23 American Airlines, Inc.*, 531 F. Supp. 957, 962 (N.D. Tex. 1982) (21 days). Plaintiffs'  
 24 proposed form also is ambiguous about whether this filing deadline is mandatory.

25 In addition, Plaintiffs' suggested form erroneously would require opt-in plaintiffs  
 26 to accept representation by Plaintiffs' counsel. In fact, any opt-in plaintiffs are entitled to  
 27 the representation of their choice, and should be so informed if any notice is required.  
 28 *See, e.g., Schwed v. G.E. Corp.*, 159 F.R.D. 373, 379 (N.D.N.Y. 1995) ("it is entirely your

1 decision [as to] whether you prefer to be represented by the present plaintiffs' attorney or  
2 by an attorney of your own choosing"); *King*, 1986 WL 2628, at \*6 (sample notice with  
3 appropriate language regarding legal representation); *Allen v. Marshall Field & Co.*, 93  
4 F.R.D. 438, 447, 449 (N.D. Ill. 1982) (same).

5 Many other errors appear in Plaintiffs' proposed notice.<sup>7</sup> Defendant is confident  
6 that if the Court ultimately determines that notice is necessary, such errors can best be  
7 resolved through a face-to-face meet-and-confer session between the parties, subject to  
8 judicial resolution of any short list of disputed issues.

9  
10 VI. CONCLUSION

11 For the foregoing reasons, Plaintiffs' motion should be denied.

12 DATED: April 6, 2009

JAY A. ZWEIG  
BRYAN CAVE LLP

13  
14 BARBARA L. JOHNSON  
DONNA D. MELBY  
PAUL, HASTINGS, JANOFSKY & WALKER LLP

15  
16 By: /s/ Barbara L. Johnson

17  
18 Attorneys for Defendant  
19 SmithKline Beecham Corporation

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27  
28 <sup>7</sup> Among other things, Plaintiffs' notice inadequately describes the definition of the proposed collective class, just as Plaintiffs' motion does.